IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
-vs-	)	Criminal Case No.
	)	
YOUSEF MOHAMMAD RAMADAN,	)	2:17-cr-20595-MOB-EAS
	)	
Defendant.	)	

_____

MOTION HEARINGS
BEFORE THE HONORABLE MARIANNE O. BATTANI
UNITED STATES DISTRICT JUDGE
Detroit, Michigan - Wednesday, April 18, 2018

APPEARANCES:

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(Proceedings reported by mechanical stenography. Transcript produced by computer.)

TABLE OF CONTENTS

EXHIBITS:

(None offered)

Wednesday, April 18, 2018

2:10 p.m.

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THE CLERK OF THE COURT: Please rise.

The United States District Court for the Eastern District of Michigan is now in session. The Honorable Marianne O. Battani presiding.

You may be seated.

Calling case number 17-20595, the United States *v.* Yousef Ramadan.

THE COURT: Okay. Counsel, may I have your appearances, please.

MR. MARTIN: Good afternoon, Your Honor. Michael Martin and Ronald Waterstreet on behalf of the government. And with us today is the case agent, FBI Special Agent David Banach.

THE COURT: Thank you.

MS. FITZHARRIS: Good afternoon. Colleen Fitzharris and Andrew Densemo on behalf of Yousef Ramadan, who is being assisted by an Arabic speaking interpreter.

THE COURT: Okay. Would you swear in the interpreter, please.

THE CLERK OF THE COURT: Do you solemnly swear that you will interpret accurately and completely from the Arabic language to the English language and English to Arabic using

your best skill and judgment?

THE INTERPRETER: I do.

THE COURT: All right. We have a number of motions here. Do you want them in any particular order, counsel?

MS. FITZHARRIS: Unless Your Honor has a preference of what we would like to address first, I ...

THE COURT: No. We don't care.

Mr. Waterstreet?

MR. MARTIN: Your Honor, I was going to suggest a particular order, because I think it would help narrow down what needs to be decided. I did prepare a document that -- in which the order that I would propose them to be heard in. If I could just pass that up to the Court?

THE COURT: Okay.

(Document passed.)

MR. MARTIN: And what I have done is I've labeled each of the five motions that you requested a hearing on today, one, two, three, four and five. And then underneath one and two I have actually listed the discovery that the defendant is requesting with respect to that particular motion.

THE COURT: All right.

MR. MARTIN: And then at the bottom of the page I've indicated that -- there's two motions that aren't on the list for today that ultimately must be decided by this Court at some point. And I think resolution of the first two become moot, if

the bottom two are decided. And I've italicized the defense motion to dismiss for destruction of video evidence. And then I've italicized what evidence would become moot at that point. And then I have underlined the defense motion to suppress evidence in violation of the Fourth Amendment.

That -- deciding that would then moot several others as well. So most of one and two will become moot if the decision on those bottom two motions is ruled in favor of the government.

I know we've had oral argument.

THE COURT: We've already done this.

MR. MARTIN: We've had oral argument on the Fourth Amendment issue already. We have not had argument on the motion to dismiss for destruction of video evidence.

So when we first began the suppression hearing in January, at that time I asked the Court to rule on the Fourth Amendment issue because the undisputed facts were that the search took place at the border and as a legal matter, no warrant was required. We went ahead with the evidentiary hearing on that issue because we already had the witnesses there and Your Honor said, you know, they're here. I've got time. Let's just go ahead and do it.

And that made a lot of sense. But now the parties are litigating discovery related to whether the agents had probable cause or reasonable suspicion.

THE COURT: Okay.

MR. MARTIN: And I think resolving that motion could save us a lot of time.

MS. FITZHARRIS: We would disagree with the government that now is the appropriate time to resolve those issues. The issue is the Fourth Amendment and what level of suspicion is required to search digital devices, if any, is a hot topic. And I think Mr. Ramadan has a right to develop the record on what facts the government had before it chose to search his digital devices so that the record is complete when this Court is confronted with that legal question and for the court of appeals.

I mean, because, hopefully, we don't have to go back and forth between here and the court of appeals if the Supreme Court or Sixth Circuit ultimately decides that some level of suspicion is required.

I think Mr. Ramadan should be entitled to have a complete hearing on the circumstances leading to the search of his devices. So we object to that at this time.

THE COURT: The Court is not going to rule on that at this time but will do it in a written opinion at the time we make ruling on all the other issues in this case so that everything that is done -- that goes to the court of appeals, goes to the court of appeals.

MS. FITZHARRIS: Okay.

THE COURT: But the motion to dismiss for destruction of video evidence, that's kind of -- you have that also in your other motions somewhere.

MS. FITZHARRIS: Yes. So this is still -- you know, frankly, a lot of things are going on in this case. It's kind of been a moving target as we learn new information, particularly information about evidence that has been destroyed. And so we have supplemented our briefing as we learn new evidence, as we learn about nondisclosures and as we've learn about additional destruction.

There is the affidavit of Ms. Steed (ph). I think -- in my most recent filing, I do think that there is sufficient evidence to show that the federal government had control over the video recording commitment -- equipment in the rooms where Mr. Ramadan was interrogated.

You know, this is government property. In order to access it, you need to get permission from CBP, not from the Wayne County Port Authority. There are indications of federal government authority all over the room.

As Agent Kelly testified, even to get on the computer you have to have a specific federal government ID. And so I think to say the government had no responsibility to preserve this evidence, particularly when Mr. Ramadan's statements were included in the application for a search warrant of the storage unit it is a little -- it doesn't make sense. Particularly,

when the federal government had so much control and access over the room where the interrogation took place.

The issues related to the destruction of Officer Armentrout's notes, those -- those we have to discuss as well. And there was some testimony by Officer Schmeltz that he usually destroys -- shreds notes after he writes a report.

We -- that is why we have requested the evidence retention policies for CBP and also --

THE COURT: Why don't we stop there. Because you're going into all of these, and I'll take them in order.

MS. FITZHARRIS: Sure.

THE COURT: I'll take them in the that they're on here. So, 50, first.

MS. FITZHARRIS: Well, I actually had a slightly different approach I was going to take. I was just going to identify the evidence that we are seeking and explain to the Court why we think it is relevant and material, which is pretty much the same question. So even if it's not taking it motion by motion, I just wanted to get all of that out at the beginning.

THE COURT: All right.

MS. FITZHARRIS: And at the outset it's worth noting that this is all relevant to determine whether the evidence, the firearms and Mr. Ramadan's statements are admissible at trial; whether they were seized lawfully. So it goes to the

quantity of proof that the government will have. And it, obviously, will be very determinative of whether Mr. Ramadan -- whether it can prove that Mr. Ramadan committed the violations stated in the indictment.

To that end, we have requested identification of the federal officers who were involved in the investigation, interrogation at the airport. We have also asked for identification of which federal agencies those officers work for.

And the reason we have asked for this is because, during the first day of the evidentiary hearing, there was, frankly, some names that came up that we were not familiar with. And we have become concerned over time as we've learned more about the government's views about its disclosure obligations that we haven't received reports, E-mails or statements or a number of other evidence relevant to find out exactly what happened on this night.

THE COURT: What other reports do you feel you have not received?

MS. FITZHARRIS: We don't know. And the reason we have asked for this is so we can make specific requests and get --

THE COURT: Who are you asking for it? Where were these officers that you're asking about?

MS. FITZHARRIS: So these are the TSA officers. There

is an --

THE COURT: Stop. Slow down. Okay.

All right. TSA officers who were there when they interrogated them or just any TSA officer that was at the airport?

MS. FITZHARRIS: So to answer some of these questions, I'm going to refer you to the letter that I -- we sent the government on shortly -- following up on some discovery. And those were exhibits to the 17C subpoena motion.

THE COURT: The what?

MS. FITZHARRIS: The 17C -- motion for a 17C subpoena.

THE COURT: Okay.

MS. FITZHARRIS: All right. So I have attached ...

THE COURT: Which exhibit?

MS. FITZHARRIS: So there are three exhibits. There is Exhibit A, which is page ID number 668.

THE COURT: I've got it.

MS. FITZHARRIS: All right. That was the first E-mail sent requesting information. And this was before we had the transcripts.

And once we received the transcripts, if you turn to page ID 673 to 674. It specifically identified the names of officers who were in -- who were mentioned during the evidentiary hearing. So that is Ahmad Rammel, Jesse Nagy, Officer Haeck, Officer Schmeltz, Supervisor Stiggerwalt and --

you know, we don't have any reports from Officer Vasher who, obviously, testified.

Some of these names were new to us. Which is -- and we specifically requested their writings once we learned their names.

We have asked for identification of those officers and which agencies they work for because we don't know what we don't know. And we want to make sure that our record is complete and that we have been provided any contemporaneous reportings or statements taken during that investigation.

THE COURT: Okay.

MS. FITZHARRIS: All right.

The second -- those things are kind of together.

The second thing is this unredacted 2010 tip reports. The government brought this up during the direct examination of Officer Armentrout and went into some of the details of that report back in 2010.

As I mentioned in motion and also at the previous hearing, the last three pages of that report are heavily redacted. We do not know what those redactions cover.

Officer Armentrout told the Court that he did not have access to information about any follow-up investigation. It's very difficult for us to know whether that's true when we can't see the full report.

THE COURT: Well, wait a minute. If you didn't have

access, why do you have to see the full report?

MS. FITZHARRIS: Well, he mentioned it. He referenced it. So Mr. Waterstreet marked that exhibit, I believe it's Exhibit I, and then asked specific details drawn from that report. All right.

So it was my understanding during the hearing that the report -- either Officer Armentrout looked at the report before the hearing or it would be used to refresh recollection. And if we don't know what is in that report, it's very difficult to -- if not impossible, to cross-examine Officer Armentrout or any other officer.

THE COURT: But what you need to know is what he knew at that time, right? Because he didn't have a copy of the report at that time.

MS. FITZHARRIS: Well, you know, what's in the tip? What's in that tip? What do they see? We actually don't know.

THE COURT: I don't know. Did you ask what they see?

MS. FITZHARRIS: You know, they said not very much. They said -- you know, Officer Schmeltz says he doesn't give it a lot of attention because it could be inaccurate.

But it was something the government thought was important to bring -- at least to mark as an exhibit and to bring to the Court's attention and we have never been provided any reason about why we are not permitted access to this report

that the government thinks is important.

THE COURT: Okay.

MS. FITZHARRIS: The third -- you know, I would say this is also relevant to the question about reasonable suspicion, probable cause.

The next category of materials have to do with counter-terrorism training materials. We asked for this information because a number of these officers are part of various counter-terrorism units; the Joint Terrorism Task Force, the Tactical Terrorism Response Team and any number. There are a lot.

THE COURT: Why do you need these?

MS. FITZHARRIS: These were mentioned as part of their training.

THE COURT: Right.

MS. FITZHARRIS: And a lot of this has been -- this goes to the question, again, what level of suspicion, what reasons they had other than stereotypes or, you know, gut feelings about Yousef Ramadan that caused them to search the computer. And so that is why we've asked for them.

The next category of information is the evidence retention policies for the various agencies involved. That would be FBI, HSI, CBP, the Joint Terrorism Task Force and the TTRT and, frankly, any of the federal agencies involved.

This has to do with the fact that pretty significant

evidence has been destroyed in this case; the video, Officer Armentrout's notes. We don't know if there were other notes taken and have been destroyed. And one of the issues this Court has to decide in the motion to dismiss the indictment or some other sanction for the destruction of critical evidence is the good or bad faith of the government.

There was some suggestion that Officer Schmeltz shredded Officer Armentrout's notes because that's his usual practice. We'd like to see what the usual practice is. We would like to see what the practice is about seeking out video and when agents from the FBI or HSI are told it is important to report interviews. So we think that is directly relevant to the motion to dismiss. But, frankly, also to the question surrounding voluntariness of Mr. Ramadan's statements. I think it's undisputed he did not receive Miranda warnings. And, frankly, also to the question of whether he was in custody, which I know is being litigated.

Then there's the -- we are also seeking *Giglio* material.

THE COURT: Pardon?

MS. FITZHARRIS: The *Giglio* materials. And those are for Special Agent Michael Thomas, CBP Officer James Brown, Officer Matthew Robinson, Officer Vasher, Officer Schmeltz, Officer Armentrout and Officer Kelly.

The first two names I have mentioned are the two

witnesses we have subpoenaed to testify at the next evidentiary hearing over some protests. We were, as you know, very surprised when the government did not call them as witnesses.

The others are agents who have already testified. And the reason we have asked for that material after learning that the government has *Giglio* materials, at least with respect to Agent Thomas, is that --

THE COURT: What *Giglio* materials does the government have? What are you talking about after learning that they have them?

MS. FITZHARRIS: Agent Thomas was apparently involved in the *Koubriti* case and he ...

Would you like me to continue?

THE COURT: No. Not unless you have -- I mean, I know about that. But anything else you have about these officers?

MS. FITZHARRIS: No. But we have no guarantees that they have either done *Giglio* checks or have turned over anything that they may have found. In fact, the government's position is that we are not entitled to *Giglio* materials of any kind at a suppression hearing.

We have asked for those out of an abundance of caution. And, frankly, if the government is willing to represent to the Court that it has conducted *Giglio* checks with respect to the officers who have already testified and that they have not found anything, then we are satisfied with that.

There's no need for the Court to order the disclosure of those materials.

THE COURT: But you're saying if they agree that they have already done a check and found nothing?

MS. FITZHARRIS: Correct.

THE COURT: Well, then there's no materials to give.

MS. FITZHARRIS: But we don't have those representations. And we're asking -- all we're asking for is a representation to the Court that the government has followed its *Giglio* check procedures with respect to those agents.

And the same with respect to Officer Brown. If the government has conducted a *Giglio* check and has not discovered anything that would come back, we don't need to argue much about that further. What we know, however, is that there are *Giglio* materials about Agent Thomas.

You know, the final issue is what sanction is appropriate for the government's failure to turn over Officer Robinson's statements after he testified on direct examination and after we specifically requested those materials in time for use.

THE COURT: Okay.

MS. FITZHARRIS: All right. So in terms of what authority, we think -- why Mr. Ramadan is entitled to these materials. I'm going to begin with *Giglio* and *Brady*, the due process clause, which requires that the government --

THE COURT: Tell me which number. I can look that up. Is it 50? 55?

MS. FITZHARRIS: Yes. So that is going to be 55. The government's response is 66 and our reply is at 67.

Due process clause requires the proceedings be fair. So the holding or misrepresentation of the Court -- of events in any criminal proceeding is not fair without disclosure. The government wants to limit its disclosure obligations to trial, but the case law, and the reasons behind the due process laws and the *Giglio* and *Brady* line of cases don't back that up.

And their reply brief went into some comparison between the *Brady* line of cases and ineffective assistance of counsel cases, which are both ultimately concerned that process, the criminal proceedings, are fundamentally fair.

And the Supreme Court has said that even if a motion to suppress doesn't have much to do with the guilt or innocence of the defendant, if an attorney performs deficiently at a pretrial motion stage and misses a meritorious Fourth Amendment motion, that results in fundamental unfairness and requires reversal. The prejudice inquiry is tailored to the specific proceeding at issue, which is the pretrial proceeding.

And I think that same logic applies in full force at a suppression hearing. That it is incumbent on everybody involved in the criminal process that the suppression hearing, which is, you know, a very important, critical stage of the

proceeding, be fair. And that the Court have the information necessary to turn it over. But it's a lopsided -- but where we are right now is very lopsided. The government has information that Yousef Ramadan does not have and cannot get.

And Agent Thomas's credibility is important in this case. He was one of the authors of the two reports that we received. It's the only 302 that we have seen at all. If you compare the warrant application to the 302, you'll see the language is very similar. Agent Thomas's description of the interrogation and what Mr. Ramadan said and everything found and how supposedly voluntary it was, and all of that was drawn and put into the warrant. So his credibility is pretty fundamental in this case.

And Mr. Ramadan, defense counsel, we have no desire to relitigate *Koubriti*. But we think it is very important to learn exactly what happened.

THE COURT: We're not going into *Koubriti*. I'm telling you that right now. There's no need to do that in this suppression hearing.

MS. FITZHARRIS: But we think that it is relevant to know about Agent Thomas's credibility.

THE COURT: But you know about this. Is there something else? Some other case or something? I mean, you know about *Koubriti*. This is public.

MS. FITZHARRIS: Very much of it is and very much of

it is not. The criminal case is under seal. It's not accessible on PACER. I will tell you, Your Honor, I was in high school in Seattle Washington when *Koubriti* was going on. I do not know about Koubriti.

I -- Mr. Densemo was not the counsel of record and it -- the government's accusations to the contrary, we take very personally and we think are unnecessary. But that's kind of beside the point. The point is that there is information about Agent Thomas's integrity, his willingness to potentially -- we don't know. His potential willingness to testify under oath at trial and lie. His willingness to destroy evidence and withhold it from the defense.

These are really important questions in a case where we have destruction of evidence that we believe is beneficial to Mr. Ramadan. And we have withholding of material until the last minute and where the credibility of the agents involved in the interrogation is pitted against Mr. Ramadan's credibility.

We're not talking about a lengthy cross-examination, but we think that whether he was sanctioned -- and, you know, it's frankly also relevant to the question of good faith. You know, voluntariness inquiry has some subjective component to it that includes the agent's conduct. And the government has asserted a very broad reading of the good faith exception to encompass something other than a warrant or a written down law.

So we are entitled, Mr. Ramadan is entitled, to

examine and interrogate whether the agents involved in this case acted in good faith. And I think this is very relevant. We are also -- we do not know if Agent Thomas has been involved in any other misconduct. We do know not know if he was sanctioned. We do not know if he was required to attend additional training about how to behave and how to preserve evidence. All of this is in the FBI personnel files and not in the public record.

The cases that the government cites are not to the contrary. They have cited to -- you know, talked mostly about Supreme Court case law. The Sixth Circuit has never addressed the question of whether *Giglio* and *Brady* line of cases require disclosure for -- in time for use in the suppression hearing.

The Ninth Circuit has said that it is required. The D.C. Court of Appeals -- which is like the D.C. Supreme Court. So all federal law is the same. They have also reached that conclusion. As has the Fifth Circuit.

There is -- and the cases that they have cited are this case called *Raddatz* and *Ruiz*. *Raddatz* is about the constitutionality of delegating authority to magistrate judges to conduct suppression hearings and whether it's constitutional for the district judge reviewing a report and recommendation not to conduct an additional de novo evidentiary hearing.

What the court did is it looked at the -- in that case, it looked at the *Matthew v. Eldridge* factors and looked

up the rights of interest and what protections were in place and the harm it would cause to require some other procedure. And what the court said is that, well, you have de novo review by a district court. Yes, a cold record is not as good as a live record, but with de novo review by an Article III judge, the interest, the Fourth and Fifth Amendment interest of a defendant are adequately protected at a suppression hearing.

In *Ruiz*, the question was about whether there is a need to disclose *Giglio* materials before someone enters into a fast track plea agreement with the government. Again, the Court looked at the *Matthew v. Eldridge* factors and looked at the interest at stake, the harm it might cause and what procedural protections were in place and said, well, we have Rule 11, which has a lot of protections baked into it that require the courts to go through the rights that the person is giving up.

And those plea agreements actually had a specific provision that said that the government would turn over evidence that was relevant, exculpatory evidence. So there were these procedures in place to ensure that the rights of people -- that people were waiving, were adequately protected.

With respect to a pretrial suppression hearing and access to critical impeachment evidence and *Brady* material, there are no such protections in place. We have what we can do with public records and we have investigators, but we don't

have access to a lot of what the government might know.

And I think there would be nothing without the *Brady* or *Giglio* requirements to prevent the government from maneuvering and intentionally suppressing exculpatory evidence that is critical to determination of a pretrial motion beforehand. There are no other mechanisms or safeguards in place. The rights at issue, Mr. Ramadan's rights, his right to be free from unreasonable seizures and not to have compelled testimony used against him, those are vitally important. And the Supreme Court's case law on Fourth Amendment and Fifth Amendment exclusionary ruling all bear this out.

THE COURT: Okay.

MS. FITZHARRIS: And it's already DOJ policy to require this disclosure. So it's hard to see why this is so burdensome on the government.

The other thing, I'm going to talk about is Rule 16. We believe Rule 16(e) -- 16 -- what is it?

16(e)(1), romanette one, also requires disclosure of the things we'd asked for because these are materials, documents, books that are material to preparing the defense. Part of the defense is litigating what evidence is admissible at trial and whether it was lawfully obtained.

And so we believe that Rule 16 requires, upon request, disclosure of certain issues that will help flush out those issues.

Now, with respect to Officer Armentrout's notes and the video recording. Rule 16(b)(2) requires the government to disclose and make available any portion, written or recorded, record containing the substance of an oral statement made by the defendant before or after arrest, if the statement is made in response to interrogation by a person the defendant knew was a government agent.

I think it's very clear that Mr. Ramadan knew that he was speaking to government agents when he was at the airport. It was -- you know, we're quibbling about whether he was under arrest. We think he was under arrest. The government disagrees. But for Rule 16(b) that doesn't matter.

So the government's response that he wasn't in custody, this wasn't a custodial interrogation is really beside the point. That's not what Rule 16 requires. And I think there's ample evidence in this record to show that Mr. Ramadan was in custody that I don't need to dive into now. It's in the briefing. But, I think handcuffs, he wasn't free to leave, nine hours, these are all facts that show this was a custodial interrogation.

But those notes, they have been shredded. That video gone. Even though these are documents that are covered by Rule 16(b)(2).

Then there's the Court's inherent authority to manage discovery. I think Your Honor has an interest in resolving

these issues accurately. We -- there have been a lot of surprises in the litigation of this motion, these multiple motions. And I think it is in Mr. Ramadan's interest, as in all of our interest, to ensure that we don't have any additional delays because of the fact that we have learned for the first time that we have not received evidence, and critical evidence, that bear on the questions related to these motions.

Which is why we think that there needs to be some sanction for the government's failure to disclose Officer Robinson's report and E-mails. After he testified on direct examination we learned for the first time that he wrote a report on cross-examination. Mr. Densemo asked him to provide that report. Later in cross-examination we learned that he sent E-mails that included the photos of -- and would have time stamps of when he took the photos of Mr. Ramadan's luggage.

The time line is somewhat important. There's been some dispute in the record about when exactly everything took place, how long. You know, who was talking to Mr. Ramadan for how long, things like that.

So we want -- we think those E-mails provide very critical information about when the information about the items in the luggage was communicated to other officers. We didn't have it in time to question Mr. -- Officer Robinson about that. We didn't have the ability to explore why he didn't put things in the report that he was testifying to in the report. And

this is not news to the government that this kind of practice is common in a criminal case. This is how impeachment works. This is how we try to get to the bottom of things is through the crux of cross-examination and adversarial testing. But we were deprived of the ability to do that. And so we think some sanctions -- you know, the Rule 26.2(e) says that the testimony shall be stricken. And so that is a remedy that is available to the Court.

THE COURT: Okay. Are there other questions you want to ask Officer Robinson now that you have this information?

MS. FITZHARRIS: I think we -- you know, we don't want to delay things more. We would -- I think it is --

THE COURT: Yes or no?

MS. FITZHARRIS: Yes. There are things that we want to ask him.

THE COURT: Okay. We can end this one. You can bring him back in and you can ask questions now that you have the information. We don't need further argument.

MS. FITZHARRIS: But I think it is part and parcel of what has been going on in this case where we have not been provided information to which Mr. Ramadan is --

THE COURT: All right. Go on with your argument. You've already argued that, counsel.

MS. FITZHARRIS: Okay. So there are a lot of various forms of relief that we have requested. We have requested

production of requested materials that I outlined at the beginning. That's to strike Robinson's testimony. One remedy for the destruction of Mr. Ramadan's notes is to strike Officer Armentrout's testimony about Mr. Ramadan's statements. There is suppression of Mr. Ramadan's statements for the Rule 16(b)(2) violation. That is a remedy available that we have requested. We've also requested an adverse credibility inference related to government witnesses' testimony for the destruction of the video.

We also think one might be appropriate for the destruction of Officer Armentrout's notes. We've also asked for a dismissal of the indictment.

Before I finish up, this case has gotten very personal. The government has made a lot of attacks on Mr. Densemo's integrity and my integrity that are unwarranted and unfounded. As I mentioned before, I was far away and quite young during the *Koubriti* case.

It has never been our intention for bringing Agent Thomas on for the sole purpose of impeaching him. We are asking for the agent's *Giglio* materials because Mr. Ramadan is entitled to them and the government's accusations to the contrary are completely unnecessary.

But it really speaks more to the way the government has treated Mr. Ramadan from the beginning. It's decided on who he was and it's been unwilling to reconsider anything about

who he is from the beginning even when he provided reasonable explanations.

And so we think some sanction is in order and certainly Mr. Ramadan is entitled to access the information we've requested. Unless the Court has any other questions, I think I'm done.

THE COURT: Thank you.

Response?

MR. MARTIN: Your Honor, I'd like to start with some basic legal principles about discovery because that's what all these disputes are about, discovery disputes. And they all are discovery disputes about the defendant's ability to litigate a motion to suppress.

We're not here on discovery disputes about whether the defendant is guilty of the crime charged which, as you know, is the possession of two firearms in a storage locker a week after the events at the airport, and those firearms had obliterated serial numbers. That's the crime. And very little, if any of -- none of what they actually seek in their discovery request goes to the guilt. Goes to the question of whether or not he's guilty of that offense or innocent.

It goes to their effort to litigate a suppression issue. Did the agents have probable cause to search the electronic devices? Did they need a warrant? All of those are separate from questions of guilt. Did the agents coerce

statements out of him? Did they Mirandize him? Were they required to Mirandize him? All those questions are suppression questions and important and have to be resolved by the Court, but they don't go to guilt.

And all of the discovery obligations the government has vis-a-vis *Brady* and vis-a-vis these Rule 16 provisions that the defense has cited, go to questions of guilt.

I want to start with *Brady* and the due process clause. *Brady* and *Giglio* are based on the Fifth and Fourteenth Amendment, the due process clause which protects life and liberty. And when applied to the criminal context, the Supreme Court said in *Brady* that evidence must be turned over under the due process clause if it's related to material -- excuse me. It's material either to guilt or punishment.

And *Brady* was decided in 1963. And in a decade since, case after case after case all the way up to the present, the most recent one I found was 2017. It's cited in our brief. The Supreme Court has always described the *Brady* obligation as evidence that pertains to guilt or punishment.

The overriding concern -- that's a quote -- is with the justice of the finding of guilt. That's *United States v. Agurs*, a 1976 Supreme Court case.

The due process clause requires the government to produce discovery when it, quote, might affect the outcome of the trial, end quote. That's *United States v. Bagley*, another

Supreme Court case from 1985.

United States v. Ruiz, a 2002 decision described the *Brady* right to evidence as, quote, a trial related right, end quote.

Time and again, it's focused on trials. It's not focused on pretrial litigation. And that is the *Ruiz* case that defense counsel mentioned. It's one of, I think, the most illustrative cases we have because it involved a situation where a defendant wanted *Giglio* information, impeachment information, before trial before the defendant decided to plead guilty or not. And the argument was, well, getting impeachment information is very important to a defendant before they testify so they can know and make an informed decision -- or excuse me. Before they pled guilty, whether the information is important so that they can make an informed and full decision about whether or not to plead guilty or not.

That was the argument that they made to the court and the Supreme Court rejected that.

THE COURT: But in this case, is it not -- I'm assuming what they're trying to show with this evidence is that these individuals are not credible and therefore, for instance -- I'm going to give you an example. Because we have not heard from the defendant.

I think the allegation was he was assaulted or beat up or something to that effect.

MR. MARTIN: That is his allegation, yes.

THE COURT: So if the officers say, "No, he was fine. Nobody touched him" and he says, "No, I was beat up," then there's a question of who is telling the truth. Because what is important is what comes out; that is, that statement -- I'm not even sure yet.

But some statement about where the guns are or he had guns or where the guns might be.

MR. MARTIN: Right.

THE COURT: Right? Isn't that the scenario?

MR. MARTIN: Yes. Yes.

THE COURT: So the credibility of the witnesses is important?

MR. MARTIN: It is.

THE COURT: In this case?

MR. MARTIN: It is.

THE COURT: And isn't this information important to the credibility issue?

MR. MARTIN: The answer is no on both counts.

Credibility is important in this case. But there's a much, much -- there's a bigger question for you to answer. And that is, does the Constitution of the United States require disclosure of, say, *Giglio* information in a suppression hearing when the defense calls the witnesses?

THE COURT: Has there been a case that was a

suppression hearing where this issue came up?

MR. MARTIN: Not with respect to *Giglio*. But there has been Supreme Court cases that have looked at the balance of due process in the suppression hearing context and said the due process clause does not require disclosure in a suppression hearing because the due process clause is concerned with guilt at trial and suppression hearings do not carry with the same type of due process protections that one would have at a trial. That is the *United States v. Raddatz* case, a 1980 Supreme Court case.

And here's what it said, quote, of course the resolution of a suppression motion can and often does determine the outcome of the case. This may be true of various pretrial motions, end quote.

However, the Supreme Court went on to say, quote, the suppression hearings, quote, have nothing whatever to do with improving the reliability of jury verdicts and, quote, they do not coincide with the criminal law objective of determining guilt or innocence.

And the Supreme Court said that is why, for example, we allow hearsay at a suppression hearing but we would never allow that for trial. Or sometimes in a trial the government must disclose the identity of the confidential informant so the defense can present their defense at trial, but a confidential informant's identity is never required to be disclosed at a

suppression hearing.

There's different standards that apply at a suppression hearing. And why is that? Well, it's because the interests at steak are different. At a suppression hearing you're trying to figure out, yes, you are making factual determinations and credibility is important. But ultimately what you're deciding are legal issues. Does the Fourth Amendment apply? Should the person be Mirandized or not?

You're not deciding the ultimate question of guilt or innocence. And so the due process concerns are not as strong in a suppression hearing as they are in a trial scenario. And the due process clause is primarily focused on trial. That is what it's trying to protect, the fairness of the trial. And the Supreme Court says that over and over again.

Imagine if the due process clause applied to all aspects of a pretrial hearing where a credibility or a witness might testify. And also think, Your Honor, that if that is the case, that means all state courts, all state prosecutors must follow that as well.

It's not designed to do that. It would be a radical departure for this Court to say the United States Constitution requires disclosure under the due process clause in this scenario. And that decision would apply not only to our office but every county in this district, every local prosecutor.

The due process clause sets a bear minimum of

fairness, but allows for experimentation at other levels of a criminal proceeding that don't involve that ultimate question of guilt or innocence. And so the defense can cite to you no case that has said that the due process clause applies to a suppression hearing with the exception of a couple of circuits. And those circuits, the rationale underlying those, is directly at odds with our circuit.

Our circuit has towed very strictly to the line of the Supreme Court saying that the due process clause applies to trials and to evidence that goes to guilt or innocence, and not just anything that might help a defendant in a pretrial litigation or even something that might help the defendant at a trial.

And the case that I think -- I thought of -- that first came to my mind when I was preparing for today was a case I had before Your Honor many years ago now. It was the case of the *United States v. Dawn Hanna*. It was an export control case, export control violation case. The defendant was convicted. After trial she moved for a new trial before the court saying, "I have now discovered new evidence and the government had possession of this evidence and has committed a *Brady* violation. I was entitled to this under the due process clause. And the evidence was that my co-conspirator worked for the CIA and the government had all these files about how my co-conspirator worked for the CIA and I was entitled to that."

When we litigated that before Your Honor, it was very similar to this case in that the defense's position was that materiality under *Brady* and under due process applied not just to the questions of guilt or innocence, but to anything that might have helped them in trial.

You denied that motion. Finding that, no, this new alleged evidence did not negate any of the elements that the defendant was convicted of and, therefore, did not implicate *Brady*. She appealed. That case went to the Sixth Circuit in 2011 and the Sixth Circuit affirmed the conviction and addressed this specific issue. She raised the same issue about her co-conspirator that was raised before Your Honor.

The Sixth Circuit affirmed the conviction and affirmed your decision. And it did so because it adhered to that strict line that due process and *Brady* applies to guilt.

And here's what they say: Quote, there's no constitutional duty of a prosecutor to disclose everything that might influence a jury. The mere possibility of an item of undisclosed information might have helped the defense or might have effected the outcome of the trial, does not establish materiality in the constitutional sense. Instead, the evidence must be material either to guilt or punishment.

They were saying, as you said before, and as I am arguing all these line of cases, *Brady* is interested in the fairness of your guilt. Not the fairness of your detention

hearing or your suppression hearing or your discovery motions and things like that.

So the Constitution has a very limited application here and I do not believe any of these materials are discoverable as a constitutional matter.

As to Rule 16, there is one rule that the defendants cite as a basis for requiring disclosure. Actually, there's two rules. One with respect to Officer Armentrout. I'll talk about that in a minute.

But the other rule is with respect to the documents they want. The CBP tip, the evidence retention policies, the counter-terrorism policies. And that's rule 16(a)(1)(E) which requires the government to disclose documents that are, quote, material to preparing the defense.

There is a Supreme Court case on this particular rule that defines what "the defense" means. And "the defense," according to *U.S. v. Armstrong*, which is a Supreme Court case, means claims that -- or any evidence -- that negates the government's case in chief. Case in chief, at trial, obviously.

And I want to illustrate how narrow that is. And I'm going to actually use a case that the defense cites. It's a Sixth Circuit case, *United States v. Lichen*s 428 Federal Appendix 621. It's a 2011 case. And it was -- I'm just going to illustrate this with some facts. It was a felon in

possession of a firearm case. The case went to trial. The government proved its case. When the defense put on their case, the defendant testified and said, "I don't possess guns. I don't have anything to do with guns. I certainly didn't possess the one you charged me with."

In the government rebuttal case they introduced a photograph of the defendant holding a rifle. Not the firearm he was charged with, but just some other rifle to rebut his testimony that "I don't have anything to do with guns. I never possessed guns."

The government had not provided that photograph in discovery. The first time the defense saw it was when it was shown in rebuttal. And they said, "Whoa, Rule 16 violation. This was material to preparing my defense."

And the Sixth Circuit in *Lichen* said, no, it's not. Because under this *Armstrong*, the Supreme Court *Armstrong* opinion, "the defense" under Rule 16 means your rebuttal to the government's case in chief. Not anything the government might use in its rebuttal case.

That's how narrow the Sixth Circuit has read "the defense" under Rule 16.

So taking that and applying it to our case, these suppression issues have nothing to do with rebutting the government's case in chief, meaning his guilt or innocence of possessing the firearms in the storage locker.

So for that reason, that Rule 16 does not apply. That part of Rule 16 does not apply. And there was -- I litigated this exact question before Judge Cox in 2014 in the case *United States v. Hermes*. I only have the Westlaw cite, which I'll read into the record. It's 2014 WL 3440323.

And the question was: Does Rule 16, this particular rule in Rule 16, apply to suppression hearings? Does the government have to give over anything that might help the defense in a suppression hearing? And Judge Cox for the reasons I just articulated says, no, it does not. That rule in Rule 16 does not apply to suppression hearings. Because it is not responding to the government's, quote, case in chief.

The other Rule 16 that the defendants point to has to do with Officer Armentrout's notes. Just by way of background, Officer Armentrout was the officer who testified he was the one who participated in an interview of the defendant with Officer Schmeltz and then after several minutes he left the interview and began reviewing the defendant's electronic media in a separate room. So he participated in an interview for a short period of time and then he leaves and he goes and conducts the examination of the electronic devices.

During the short period of time he was in the interview, he testified that he took notes. That he gave his notes to Officer Schmeltz. Officer Schmeltz testified that he looked at the notes, he incorporated what limited information

there was in those notes into his report, being Officer Schmeltz's report, and then he destroyed the notes.

So the defense argument is that the notes that Officer Armentrout took were discoverable under Rule 16, specifically, Rule 16(a)(1)(B) which requires that any record of a defendant's oral statement that was made, quote, in response to interrogation, end quote, must be turned over.

So the two parties are in dispute as to what that phrase means in response to interrogation. It's not defined in Rule 16, but the Sixth Circuit has said that they're going to import the standard for determining whether a statement was made in response to an interrogation from a Supreme Court case called *Rhode Island v. Innis*, 446 U.S. 291 (1980).

And the Sixth Circuit case that said they were importing was *Smith v. United States*. And that's at 285 Fed.Appx. 209. It's a 2008 case.

So the Sixth Circuit says, Rule 16 doesn't define what interrogation means so we're going to use this definition given by the Supreme Court in *Rhode Island v. Innis.* And *Rhode Island v. Innis* was a Miranda case where the defendant was arrested. He was in custody.

And in that case, it says that, quote, Miranda safeguards come into play whenever a person in custody is subject to either express questioning or its functional equivalent.

We all know that the word "interrogation" is a term of art in our business. It's a term that has special meaning. It's not just anytime somebody is asked questions by law enforcement, but it's when you're in custody and you're being asked either express questions or the functional equivalent of expressed questions.

The *Innis* court, the Supreme Court in *Innis* said that Miranda safeguards were designed to invest a suspect in custody with a added measure against police practices and that's why they require Miranda because you're in police custody and you're being questioned.

So if that standard applies here, then Officer Armentrout's notes were not discoverable under the Rule because Mr. Ramadan was not being interrogated, as that term of art is used, because he was not in custody. We're litigating that issue with respect to the defendant's motion to suppress for a violation of not giving him Miranda warnings. So that issue is going to come up for you again of whether or not he was in custody or not.

But there's a Sixth Circuit case right on point, *United States v. Galloway*, 316 F.3d 624. It's a 2003 case. And it says, quote, a secondary Customs inspection is a routine noncustodial detention.

When a Customs officer detains someone to look in their bags or ask them questions about where they're going or

what they're doing or what their plans are or what they've brought into the country, that person is not in custody for the purposes of Miranda. And the Sixth Circuit has so held. And if they're not in custody, then they're not being interrogated under that Supreme Court *Innis* case and, therefore, Rule 16 doesn't apply.

But let me just say this: Even if Rule 16 did apply, and even if whenever a Customs officer asked somebody questions they have to make sure they keep their notes in case a week later a defendant commits a crime and there's a federal prosecution, which is the situation we have here, even if Rule 16 applies, you still have the harmless error standard under Federal Rule of Criminal Procedure 52, which says that violations of Rule 16, if they're harmless, should have no impact on the case and should not result in any kind of sanction for the government.

So what is considered harmless? Well, in applying rule in -- excuse me, Your Honor.

Any error in complying with Rule 16 is considered harmless unless the error has a constitutional significance. Meaning, that it effects the verdict. And that's a case, *United States v. Brinson*, which we've cited, a Sixth Circuit case from 2006.

The focus of Rule 16 is on accurately determining guilt or innocence. And the rule was not meant to extend to

issues that don't impact the defendant's culpability.

So now we're kind of coming full circle to where I started which is where the due process clause comes into play and Rule 16 sort of tracks each other in this regard. How would Officer Armentrout's notes change the verdict in this case when Officer Armentrout has no information or knowledge about the possession of obliterated guns with obliterated serial numbers in a storage locker a week after the events? They? Didn't ask him any questions about obliterated firearms. They didn't know at the time he had obliterated firearms. There's no indication about obliterated firearms. So it's really farfetched. So any error that might have occurred with respect to his notes would be harmless.

Now that I have gone over this law let me go back over the specific items that the defense has requested. The list of CBP government officers, they want a list of every government agent who was involved, they say. That's their word, involved, with Mr. Ramadan at the airport. The defense cites no case or rule of discovery that would allow them access to that list.

There are cases directly to the contrary. *United States v. Perkin*, a Sixth Circuit case from 1993 says, quote, defendant is not entitled to a list of the names of the government's witness.

That rule is, in my experience, traditionally followed in our courthouse. Even for trial purposes. Usually it's done

for convenience, you know, a week or two weeks or something before the trial, but certainly not for a suppression. I've never heard of a defendant saying, "I want a list of anybody that was in any way involved in this case."

They have no legal support for that whatsoever. No case requiring that and it being granted. I did cite two recent cases from our district which have adhered to the rule that courts uniformly held that *Brady*, the Jencks Act or Rule 16 do not require the government to produce a witness list in advance of trial.

And they're doing that. They want that list because -- and they're explicit about it. They want that list because they want to start filing more discovery requests to further litigate discovery in the suppression context.

The Customs and Border tip that they want, the government provided them a redacted copy. They are now asking for an unredacted copy because they believe the portions that the government redacted contained information about how the government investigated the tip and the tip was not true. That's not what is in the redacted portions. The redacted portions are personal, identifying information, addresses, phone numbers, Social Security numbers, dates of birth of different people and things of that nature. The redacted portions of the tip do not contain any information that would show the government investigated a tip and the tip was false.

That's not --

THE COURT: What information did the officer have when he looked at the tip? What comes up on the tip?

MR. MARTIN: I think the testimony in the hearing was just a few lines. Like an introductory sentence or two.

THE COURT: So how does one get the whole tip?

MR. MARTIN: I don't know how the officer at the time would get the whole tip. But I do know his testimony was he didn't see the whole tip. And there was a back and forth between the Court and the officer. And I think you asked him directly, "Did you see the whole tip and do you know if it's true or not?"

And he said, "I don't know if it's true. I just read the first few lines. And here's what they were." That was the extent of it.

So he didn't see the redacted portions anyways. So whether the tip is true or not -- and again, whether the tip is true or not is a question that gets into whether they had probable cause and reasonable suspicion to search the electronic devices. Which is why I said at the beginning, if no warrant is required and no reasonable suspicion is required, then what difference does the tip make at all? So that's why I said resolving that legal question on the Fourth Amendment is so important.

The training materials for terrorism training, this is

in the same boat as the tip in that it goes to whether or not the agents were searching his -- if I understand the argument correctly, I believe it's whether or not the agents were searching his electronic devices because they had biases against Muslim people and things of that nature and therefore they have to get information about what kind of terrorism training these officers had.

I have a couple of responses to that. The first is a practical response. And that is, the defense -- if the officer's training was so important to the defense, why didn't they ask the officers questions about their training when they testified? Officer Armentrout, who looked at the electronic device, testified for a lengthy period of time in this courtroom. The defense asked him many, many questions. Not one -- I have gone back through the transcript. They never asked him one question about what his training was for terrorism. Not one.

And as a result, they have laid no foundation for what type of training materials they would want. What training materials has he seen? We don't know because they didn't ask him. And yet they offer to the Court that this is somehow so critical to determine whether he had probable cause or whether he was, essentially, a racist or not.

Well, he testified. They can ask him questions about his biases and all that. And they did ask him questions about

that, but this training material has nothing to do with whether or not he could under the law search those computers. Because now we're back to the border search question, which is a legal question. But more importantly, the defense, when they had the opportunity to conduct the cross-examination, didn't even bother. So now they want the government to search its files for training materials that they didn't even bother to bring out on cross.

The evidence retention materials that they want, this is primarily about this video. And I want to give the Court some background because this is the first time I have addressed the Court about the video. We -- the defense filed a motion to dismiss the indictment because the government allegedly destroyed video from inside the airport that they say is exculpatory.

That was docket number 32. That was their motion to dismiss.

We filed a response and that response we attached an affidavit from the Director of Security at the Wayne County Airport Authority, which is an independent state agency that runs the airport. All of the video cameras -- and there's hundreds, if not over a thousand video cameras in the Detroit Metropolitan Airport.

Those are all operated and controlled and run by the Wayne County Airport Authority, including the video cameras in

the secondary Customs inspection area. The Wayne County Airport Authority records that video and retains it and then, pursuant to their internal policy, destroys the video after seven days. And you can understand that if they have over a thousand cameras in that airport, why they can't just hold on to that video indefinitely, just the sheer volume of it.

None of those facts are contested. The defense would have you believe that it is the government's responsibility to possess and retain video evidence that is in the possession of a third-party. And there is no law that requires that or holds to that effect.

There is a series of cases and a legal doctrine that is developed around the destruction of evidence. The primary case on that is a Supreme Court case called *California v. Trombetta*. It's from 1984. And it says that the due process clause does require the government to preserve evidence if it has a standard of constitutional materiality.

And to have this standard of constitutional materiality, the evidence has to meet three requirements. And the first is that it's exculpatory, exculpatory to guilt.

So let's back up. The video evidence of Mr. Ramadan -- and there is only video. There's no audio that's attested to in the affidavit. It's just video of what is going on in the secondary inspection area. There's nothing that is going to be on that video that tells you whether or not

Mr. Ramadan possessed firearms in a storage locker a week later. There's no picture or image captured in that video that tells you whether he is or isn't guilty of the crime charged. So it doesn't even meet the first requirement.

Second, the second requirement is that the exculpatory nature of the evidence has to have been apparent before the evidence was destroyed. Well, Mr. Ramadan didn't commit the crime. The guns that he's charged with were not found for a week after the event at the airport. So how would the officers know at the time that the video of him just moving about the secondary inspection area, just walking around or going here or going there or sitting in a conference room talking to agents would be exculpatory to guns that he possessed a week later in a storage locker in Ann Arbor. It doesn't meet that requirement.

And then the third requirement is that the defendant is unable to obtain comparable evidence by other reasonably available means. And there are numerous cases which we cite in our brief that point out, well, maybe this evidence is exculpatory, but the defendant already knows about it and he can testify to it. So, therefore, it's available to him by other means or maybe the defendant could call another witness like his wife who was present and can tell the Court about how he moved around the secondary inspection area, if that's important, or the defense can cross-examine government

witnesses about what happened in the secondary inspection area. And because he has that ability, due process does not require the government to hand over -- or to preserve that evidence.

But all of these cases assume that the evidence is actually in the government's possession to begin with. And here we don't even have that because it's the Wayne County Airport Authority that possessed the video and then destroyed it on their own. And the affidavit says very clearly that no one from the government instructed Wayne County Airport Authority to destroy the video.

And at the last hearing we had on the suppression hearing, Agent Banach, who is in court today, testified. And Mr. Densemo asked him on cross-examination about, you know, when he first learned about the video. And I believe Agent Banach's response was, "When you first requested it months later."

The FBI wasn't out there trying to destroy this video. So under the law that does exist, the video is not even discoverable. So why the government should then provide the defense with retention policies of evidence when the video is not even discoverable in the first place is a little far afield.

Lastly, I want to talk about Officer Robinson. I think the Court already said -- indicated that we would just call him back and they can ask him whatever questions.

He will be available. We'll have him at the next evidentiary hearing. I would just point out, we have provided the Court with a copy of his report and there's really no material difference between that. Your Honor can look at it if you want.

The defense never even asked in their motion. If they wanted to ask additional questions, we'll be happy to have him back here.

THE COURT: Okay.

MR. MARTIN: Does the Court have any further questions for me?

THE COURT: No. Thank you.

MR. MARTIN: Okay.

THE COURT: Reply?

MS. FITZHARRIS: Yes. The government will very likely introduce Mr. Ramadan's statements they gave at the airport at the case in chief because they are statements about the location of the storage unit. The government would not know about the storage unit, would not know about guns, would not know even where to go but for Mr. Ramadan's statements at the airport.

So to say that these motions and this video evidence and everything that we're asking for is not connected to the government's case in chief, is just incorrect. Again, they will undoubtedly introduce them to prove knowledge.

The guns themselves are integral to the government's case in chief. And so whether those guns were obtained lawfully is squarely -- is a huge part of this case.

THE COURT: But if you have a video without audio, how are you going to -- I mean, it's only going to show people moving around.

MS. FITZHARRIS: Well, that goes to the question of how long he was -- there are issues of how long he was handcuffed, whether he was assaulted, the circumstances surrounding everything.

The other thing I will tell you is that Mr. Densemo and I went to those rooms. There are microphones in those rooms. There are video recording devices in every room and microphones.

THE COURT: But it wasn't recorded. There's no evidence that it was recorded. Video, I mean. Or audio recorded, right?

MS. FITZHARRIS: Um ...

MR. MARTIN: Correct.

MS. FITZHARRIS: Other than the government's representations, I don't understand how we're supposed to verify that. As far as --

THE COURT: Well, maybe you can't. But we can't assume that this was recorded. I mean, normally, the FBI generally doesn't record their statements. This has been a

subject of discussion many times. So, you know, to say we have to assume because there was recording equipment it was recorded, doesn't --

MS. FITZHARRIS: So HSI, actually, is required to record as a CBP. Particularly, if a recording is requested.

THE COURT: If a recording is requested?

MS. FITZHARRIS: Yes, by the interrogee.

THE COURT: Okay. But that didn't happen, right?

MS. FITZHARRIS: Mr. Ramadan did request it be recorded.

THE COURT: Oh, he requested it was recorded. That's the first time I heard that. Interesting.

Okay. Go ahead.

MS. FITZHARRIS: So with respect to how relevant it is to the ultimate questions of whether Mr. Ramadan will be punished or convicted, the things we are seeking are integral to those questions.

The government also will -- you know, to begin, the government wants to limit its *Giglio* and *Brady* obligations to trial. That is not the language of *Brady* -- of *Bagley*. And the actual materiality standard of *Bagley* is whether the result of the proceeding would have been different. And that's at 473 U.S. 667 at page 682. That is exactly the same -- and that is the case where that adopted the *Strickland* standard, which also looks at the result of the proceeding and the effect of

the evidence -- withheld evidence on the proceeding.

Mr. Martin, I believe, misspoke when he said that no Supreme Court case actually said that *Giglio* is required for a suppression hearing.

That is just not true. The Supreme Court has never, ever addressed the question of whether the government must disclose *Brady* and *Giglio* evidence relevant to motions to suppress.

Like I said before, *Raddatz* was entirely about the constitutionality of a magistrate judge's acting and whether it's constitutional to have a non-Article III judge decide something without an evidentiary hearing.

The Sixth Circuit -- the government has said that the Sixth Circuit agrees that it only has to do with the fairness of trial. Again, that is not true. That is not what the Sixth Circuit has actually said. The cases the government has cited are -- the first one is, frankly, about the *Franks* case. Whether the government is required to -- when presenting an affidavit to a magistrate judge, disclose *Giglio* information to the magistrate judge. That's *Maize v. City of Dayton*.

The *United States v. Presser*, the question is about whether *Giglio* requires production of Jencks Act materials before the person testifies, and the Sixth Circuit said no.

Snow v. Nelson was a civil rights suit that had to do with someone seeking damages after charges were dismissed when

the prosecutor disclosed exculpatory evidence that had been withheld from the grand jury. Again, this person never went to trial. There was never a suppression issue.

United States v. Uwazurike, that's an unpublished opinion. That one's U-w-a-z-u-r-i-k-e.

That was about whether it was -- the exculpatory evidence was disclosed too late in the middle of trial.

And then *Lorraine v. Kohl* (ph), is an EDCA case that has to do with Ohio discovery rules and was subject to EDCA deference. So the government's cases do not support its assertion that the Sixth Circuit does not require disclosure of *Giglio* or *Brady* materials to be used relevant to deciding a Fourth Amendment or Fifth Amendment issue.

And their arguments with respect to the requirements of Rule 16 are similarly problematic. The definition of interrogation is drawn from the Miranda line of cases. But that means the express questioning or the functional equivalent likely to produce an incriminating response. That's an interrogation.

The rule -- as I have said, the text of the rule says before or after arrest, the custodial component is not in Rule 16(b). At all.

So the government's arguments about the nature of this interview is kind of irrelevant. And *Galloway* actually supports that conclusion that ordinarily a secondary Customs

inspection is not a custodial interrogation because you're not talking about incriminating subjects.

But this interview with Mr. Ramadan went well beyond ordinary Customs inspections. I mean, they were asking about his views on ISIS. They asked him if he supported Hamas. They asked him about his feelings about Jews. These are not ordinary Customs questions.

And, particularly, when they started asking him about terrorism-related issues and the guns or what they thought was a pipe bomb, these are questions that are likely, very likely, targeted at incriminating and producing incriminating responses. So I think they are squarely within the rule -- within the ambient of Rule 16.

With respect to *Armstrong* and the applicability of Rule 16 discovery requests to pretrial motions, *Armstrong* dealt with a very, very particular type of discovery. That was about access to the prosecution's files in order to file a selective prosecution motion. It was a very, very unique type of pretrial motion.

And the Court said that this type of defense, which isn't about, you know, things like admissibility of evidence, is too far afield from the ultimate question of the government's case in chief. It's what's a sword claim saying that we're attacking the government's conduct versus saying, "Hey, this evidence that the government wants to introduce,

it's not admissible."

Now, that is a defensive claim. So if we're drawing a distinction between sword claim and shield claims, a motion to suppress evidence, any claim that's evidence the government wants to use against the defendant at trial is a shield claim and, therefore, *Armstrong* is inapplicable. And the Sixth Circuit does not hold otherwise.

The cases the government cites, I fully go into those in the brief. But in all but one, *Armstrong* is not even mentioned in those cases.

Mr. Martin and I have a different memory of Armentrout's -- the length of time he was involved in the interview with Mr. Ramadan. I mean, he -- my impression, my reading of that transcript, is not that it was short. It went on for some time and how long is a little unclear. But he, specifically said that he was writing down Mr. Ramadan's answers to questions. I know that on the second day of testimony Officer Schmeltz said there wasn't much there.

But Officer Armentrout, the author of the notes, said he was writing down Mr. Ramadan's answers to questions. I think that is more credible than Officer Schmeltz's testimony after this exhibit became an issue.

Whether -- you know, Mr. Martin was talking about the crime, the interrogation and the crime were a week apart. But the case agent was assigned to investigate Mr. Ramadan the day

after he was pulled from the airplane. You know, hours after he was released from the airport. So they were looking into Mr. Ramadan and they were looking into his statements. They were looking for that storage unit long before the tape was recorded over.

And in terms of whether this is -- you know, the government had possession of those materials, there is a very limited amount of case law that has to do with -- the government's responsible to preserve evidence that is in its custody or control. And so that's what I was talking about, the control the government had over that particular area and the relationship between the federal government and the Wayne County Port Authority.

The Third Circuit case, *United States v. Risha*, R-i-s-h-a, at 445 F.3rd 298, is the leading -- it's pretty much the leading case on the question of cooperation between federal government agencies and some other state actor. Admittedly, this, as Judge Kozinski pointed out in a recent descent having to do with prosecutorial misconduct, this is kind of an unsettled area.

But what the Third Circuit and the Fifth Circuit do is they look at a variety of factors. About the knowledge or the information is acting on behalf of or is in control.

So I think Ms. Steeds or -- I'm pronouncing her name wrong.

Her affidavit suggests an ongoing relationship between Customs and Border Control and the Wayne County Port Authority that had existed for many years. You know, if you need to have a government ID to get into this area, the federal government has complete control over everything surrounding that camera.

So it's hard to believe that it has no ability or control over what happens to the footage if they need it. And I think it's pretty clear the fact that the case agent was assigned the day Mr. Ramadan was released that what happened in that room meant something to the government.

The other thing is that if the two agencies, the state and federal agency, are part of a team that are participating in a joint investigation or sharing resources, I think that's undoubtedly true with respect to Wayne County Port Authority and the federal government's control over the secondary inspection area. They are definitely part of the same team. It's all about security at the airport, what goes on at the airport, everything having to do with the border and planes going in and out and who is on them.

The third factor is whether the entity charged with constructive possession has ready access to the evidence. Again, this is something where it's quite clear that the Port Authority did have ready access to the video recordings that were in the rooms where Mr. Ramadan was kept. We believe, based on the testimony, that Mr. Ramadan was put into -- that

there were only two interview rooms. We think he was in both and then there's a conference room. Based on our visit to the airport, both of those rooms have cameras in them. We did not go into the conference room.

But, the point is, there was ready access to this information. There was nothing preventing anyone from getting control of it. And, particularly, because the federal government was -- the FBI was, apparently, interested in Mr. Ramadan, it's incredible that they wouldn't want to look at what happened or try to access the recording of that conversation.

So I think the government's contention that this isn't even discoverable, it just doesn't work out that way. You're part of a team. The government had ready access to this information and it's very critical.

With respect to harmless error. Harmless error is a standard of review. The case the government cites is no surprise that the Sixth Circuit reviewing what the district court did with respect to a discovery motion applies harmless error review. So the fact it quotes that standard is pretty obvious. When it's in the district court, the standard is very different. And it's actually kind of backwards to say, "Well, this may be discoverable and you haven't been providing it, but the government doesn't need to provide it because I don't think it's relevant at this time even though you don't have it."

That just doesn't work that way. The Bank of Nova Scotia, the Supreme Court case that the government cites in its brief, has to do with when a district judge dismisses an indictment after a grand jury proceeding. So the district judge was conducting a review procedure and decided there had been prosecutorial misconduct and dismissed on those grounds. And harmless error review was the standard appropriate for that kind of review proceeding where the district court is acting kind of like the court of appeals. That's not the position Your Honor is in right now. So Rule 52 really has no bearing on this thought whatsoever.

We do believe that the training, Officer Armentrout, Officer Schmeltz, Officer Brown's training and Agent Thomas's training about counter-terrorism is all relevant. I asked Officer Schmeltz about his counter-terrorism training when he testified. It was, frankly, not until Officer Armentrout testified that he had that training and he started to explain what he thought was suspicious about Mr. Ramadan's answers. That's when it became clear that this was relevant to our line of questioning. So I don't think it's surprising that given new evidence and new information that the request came when it did.

Finally, credibility is really important. And there are two cases that came out of this district in the past less than a week that show how important credibility is.

Judge Goldsmith on Friday granted a motion to suppress after finding that the officers were not credible. On Monday Judge Edmunds also suppressed evidence finding that the officer's testimony was not credible. Credibility is of the utmost importance when we're talking about Fourth Amendment violations.

THE COURT: Were these in suppression hearings or trials?

MS. FITZHARRIS: Those were in suppression hearings.

THE COURT: Did they have information in the discovery like you are requesting?

MS. FITZHARRIS: There wasn't this sort of litigation about it.

But I bring those up just to bring up the point just how important credibility is in suppression hearings and why access to impeachment information in time to be used as a suppression hearing is important.

And I think that the language of that, when it talks about the outcome of the proceeding, shows that it is not -- the government's *Giglio* and *Brady* obligations are not as limited as it's reading it.

Finally, in respect to the concerns raised about how problematic it might be if this Court orders disclosure of exculpatory -- of information relevant to -- that is helpful to the defense in its suppression hearing or, you know, about

credibility about testifying officers in a suppression hearing, that -- it's really hard to understand why that is so groundbreaking or shocking when the DOJ's current policy is that they're supposed to provide *Giglio* materials *for* testifying agents at suppression hearings.

THE COURT: Well, what would be your benefit to having the tip, the full tip document?

MS. FITZHARRIS: Honestly, if the document had been produced to us where it was clear, the things like date of birth, names, personal identifying information, and then that information had been redacted out, I don't think we would be in this position. The way that it was produced to us it had just a huge block of redacted information.

THE COURT: Now, what would be your benefit no matter what it said? As long as you knew what the officer testified to.

MS. FITZHARRIS: Well, we would have been able to ask him more about that and, you know ...

THE COURT: Like what?

MS. FITZHARRIS: Like what -- if it said, you know, follow-up investigation revealed that the tip came from Mr. Ramadan's mother-in-law who has been civilly committed, you know, that's pretty relevant information that we would have liked to be able to inquire into with agent -- with Officer Armentrout if we had had it in advance.

At this point, perhaps, if the government just changes its redactions and produces the tip so it's clear that they're just protecting PSI, that's fine.

THE COURT: If the government did what?

MS. FITZHARRIS: You know, instead of like a huge block redaction the way it is now, if it redacts out things like date of birth or Social Security numbers so it's clear that that's the information that's been redacted, that's fine with us.

It's a compromised position. I -- we are just -- today is the first day when we have even been told what is behind those redactions.

So we're not here to be unreasonable, but we don't know what we don't know. And we went through -- the more we learn about what we don't know, the more troubled we are about what has been withheld. So unless the Court has any other questions ...

THE COURT: Not right this minute.

Mr. Martin, I have a question for you. There was a some discussion about whether you actually looked for *Giglio* materials for agents other than Thomas?

MR. MARTIN: Yes, Your Honor. And I wanted to address that.

The answer is, yes. For the government -- the witnesses the government called, the government did check and

there's no material to produce.

THE COURT: Okay.

MS. FITZHARRIS: Your Honor, we would like a representation about Officer Brown as well.

MR. MARTIN: Well, we didn't call Officer Brown and so he and Mr. Thomas are in a different boat.

And that's the second point I wanted to make and that is that I argued -- I spent most of my time arguing that due process clause *Brady* and *Giglio* do not apply at suppression hearings.

Let's just assume for the sake of argument that they do. We have to keep in mind the posture we're in here. The government rested its evidence with respect to the suppression hearing. We are not calling anymore witnesses. We are not asking you to rely on the testimony of any more witnesses in order for the government to defeat the defense's motion to suppress.

The defense now it's time to present their case. And they are calling Thomas, Brown and they say their client. Three witnesses in the defense case. There is no case that says that the government is required under *Brady* and *Giglio* to provide impeachment information for a defense witness. Even in a trial there are many cases to the contrary. I cite them in our brief. We have cited six. I'll just give you a flavor of one.

It's the most recent from the Court of appeals I found, *United States v. Snell* 676. It's a Federal Appendix 144. It's actually a Fourth Circuit case from 2017. And it states, quote, the government had no obligation under *Brady* or otherwise to disclose evidence that was only relevant to the potential impeachment of a defense witness, end quote.

And there's many, many more. Because it's never helpful material to the defense under the meaning of the constitutional standard under due process to impeach their own witness.

You know, Thomas or Brown are going to come up and testify and they're either going to say they beat up Mr. Ramadan or they didn't. If they say they beat up Mr. Ramadan, then how does impeaching them help the defense? If they get out of these witnesses what they want, how does them turning around and, basically, drawing out evidence and telling you, "Well, you shouldn't believe these two agents because they're liars and cheaters and all that," that doesn't help them. So it's not material and the cases are clear that the government is under no obligation to turn over impeachment evidence.

THE COURT: Well, I'm assuming they're going to say they didn't beat him up and they're going to show that they're lying.

MR. MARTIN: That they're lying about that, right.

So, but does that -- so ...

THE COURT: That's their witness?

MR. MARTIN: It's their witness. So then the question becomes why are they calling him? I mean, the reality here is they know Thomas and Brown are not going to testify that they beat a confession out of him. So then the question comes into play, "Why are they calling them?"

And that's why the government alleged that, well, they must be calling them because they knew that they couldn't impeach Thomas so thoroughly. And it was the Federal Defender's Officer that represented *Koubriti.* So it would make sense that they would know about the background on Thomas.

MR. DENSEMO: Well, we didn't know. Well, I didn't know.

MR. MARTIN: Let me also just --

MR. DENSEMO: You're wrong.

THE COURT: Just a minute. Are you on the record? Do you want to say something?

MR. DENSEMO: Yes, Your Honor. The representation from the U.S. Attorney's Office, once again, I think is disparaged me and my office because their assumption is completely wrong. I had no idea that Michael Thomas was involved in the *Koubriti* case. We had no intention of even talking about Michael Thomas or *Koubriti* until the U.S. Attorney's Office told us about Michael Thomas and his

connection to *Koubriti*.

So all of this talk about *Koubriti*, that was brought on by the U.S. Attorney's Office. Not by me. Not by the Federal Defender's Office. We had no intention of talking about it, one, because we hadn't been given any *Giglio* material that they had for eight months.

So the idea that Andrew Densemo is laying in the weeds to ambush the U.S. Attorney's Office, wrong. The idea that the Federal Defender's Office laid in the weeds and tried to ambush the U.S. Attorney's Office is wrong. We were doing this straight up. We were going to cross-examine Thomas like any other witness. Like we had cross-examined Armentrout, Schmeltz, Robinson, all the other witnesses.

We didn't try to disparage any of those witnesses' character or integrity. We didn't get into any of those things because we trusted that the U.S. Attorney's Office had provided us with *Giglio* materials and *Brady* materials. I trusted the U.S. Attorney's Office had done their job. I did not know about Michael Thomas and *Koubriti* and *Giglio* until I had got the motion from the U.S. Attorney's Office saying, "Hey, Judge Battani, don't let them talk about it."

MR. MARTIN: I take Mr. Densemo at his words. He didn't know about Michael Thomas, I take him at his word. But then we're back to the question of why they want to call a witness that's not going to provide them favorable evidence and

is there a case? Is there a legal requirement for the government to provide the defense with impeachment information about their own witnesses? And there is not.

There is also a practical consideration I want to bring up to Your Honor. There is a lot of material related to the *Koubriti* case. Myself and Mr. Waterstreet have not reviewed it all. If the Court were to order the government to conduct a *Giglio* review of that, we're talking about a major effort that would take a considerable amount of time and I want the Court to be aware of that.

THE COURT: I would think the only thing important about that is if there was some discipline or something that he had or the ultimate resolution that was negative. Or even positive. I guess they should know.

That's all they want to know. We're not going to go into, as I said before, all the detail that some of us might remember who were involved in that case. That's not necessary.

MR. MARTIN: Right. I agree.

THE COURT: So I wouldn't do that. But I do think that, given all of this discussion, that they should be given not his FBI personnel file, but sanctions against him should be turned over to them so they would know what they are.

MR. MARTIN: Well, that could be a major effort to uncover that. That information may not be as readily available as you would think. And I'm kind of quite confident that I can

represent that to the Court.

And how much time the government would need to obtain that information, I don't know.

THE COURT: Well, I know. I don't think it's going to be that time consuming. All you need to get them is a final resolution of what happened. He was -- I don't even remember. He was fired because he failed to disclose information. He was fired because he lied.

I mean, I think that's enough.

MR. MARTIN: So any kind of official discipline?

THE COURT: Pardon me?

MR. MARTIN: I'm sorry, Your Honor. Any kind of official discipline; is that what you're referring to?

THE COURT: Yes, official discipline. Yeah. I don't think we need to make a bigger deal out of this.

MS. FITZHARRIS: You know, and findings. You know, if there was discipline or anything. You know, there was clearly an investigation and there was conduct, we would like to know what the findings were.

MR. MARTIN: See, that ...

THE COURT: Well, that's a big grant. I think you can -- it's enough to know that he was -- I don't know what. Discharged for lying. Whatever it is. That's all.

We're not going into the facts of the case. I don't think that's necessary. Because it doesn't make any

difference. If he lied in this case, you can argue he lied -- or if he lied in that case, he lied in this case. Or if he failed to turn over something in that case, maybe he failed to turn it over in this case. I don't know if that would be your argument.

And I would order that you give them that information.

MR. MARTIN: We will, Your Honor. If it's something that will take a long of time, we'll alert the Court.

THE COURT: Let me know.

And how about Brown?

MR. MARTIN: Brown, we have done a check on and we are confident we met our obligations by not providing anything.

MS. FITZHARRIS: Meaning, Your Honor, they did not find anything that would be considered *Giglio* material?

THE COURT: Correct.

MR. MARTIN: Correct.

THE COURT: Okay. All right. In terms of the information you want on the officers who were there and their agencies, this is like a witness list, which is not required in our court in trial. So I don't think it would be required in a suppression hearing. You did have the opportunity, I know, to ask some of the officers who else was there and, therefore, you have that information. And if you want to know if you -- if you don't know and you want to know which agencies those individuals were with, I would allow you to -- or order the

government to give you that information.

Okay. Government, do you understand what I said? If she asks you, she or he, asks you for an agency that somebody was in, you're to turn that over, but other than that you don't have to give them any other listing.

MR. MARTIN: Yes, Your Honor.

THE COURT: And in terms of the unredacted tip report, the only testimony we have had is that the whole report was not seen by the officer; that he only saw the -- I think he said several lines or something, information there. There is indication that this is a false -- that the report may have had ...

I think this is what the defense is saying is may have had information that it was checked out. And it was merely reported by an incompetent relative. And if that's in the report, you can look in the report. If there is anything in the pages that have been redacted regarding the mother-in-law or mother, then that part should be turned over. Not addresses. Just if the mother-in-law reported it and it was found not to be relied upon.

MR. MARTIN: Yeah. I have looked at it, Your Honor. I can tell you there's nothing in the redacted portions that are about whether the information is reliable or not or was investigated or was found to be not credible. There's nothing like that in there. I've looked at that.

THE COURT: I'll take your word for it. That's fine.

So I'm not going to order that turned over.

The training material: The training material, the Court finds does not need to be turned over because it doesn't appear that the training material would have any relevance from the testimony that's come in so far to the actual statement and the subsequent finding of the guns.

The retention policies, that goes to whether the video or notes were destroyed and the Court finds the government had no responsibility for the video given the affidavit of the Airport Authority as to who controlled the videos.

Nobody asked -- I understand now that Mr. Ramadan asked for an audio, but nobody asked the government to preserve this. And at that point how would the government even know to preserve a video with no audio because there was no allegation by the officers who testified.

And, in fact, on the contrary, they said he wasn't beaten up. He said he was. But it would be nice to have the video for that. But if they did not control it and it was in the hands of the third-party and the retention policy is seven days, the Court is not going to -- well, it's not going to sanction the government. And there is no video to turn over and the Court is not going to sanction the government on that.

Also, the notes, the officers testified about the

officer taking the notes and then giving them to this Armentrout.

Well, who did the notes?

MR. MARTIN: Officer Armentrout did the notes and then he provided them to Schmeltz to do the report.

THE COURT: Officer Schmeltz to do the report. The officer testified he incorporated them into the report and then destroyed the notes.

The question there would be is there some policy? I think that's probably what the defense is asking for. Is there some policy that says the notes should not be destroyed? If there is such a policy or a policy on note retention, I want that turned over to the defendant.

As to the *Giglio* information, I think we've already covered all of that. I don't think there's anything left on that.

As to Robinson's notes, the Court has already ordered that that's -- his E-mails are to be turned over and if there's any existing report to be turned over -- I understand the photos that were in the E-mails were part of what we saw at the last hearing, but the time lines may become important to the defense. So, therefore, the E-mails are to be turned over.

MR. MARTIN: We've done that already, Your Honor.

THE COURT: Okay. And the Court is not going to strike Robinson's testimony so far or Armentrout's.

Did I miss any of these?

MR. MARTIN: I think you got them all.

MS. FITZHARRIS: I agree, Your Honor.

THE COURT: Okay. Is there anything else? Any other motion that we haven't covered here today?

Defense?

MS. FITZHARRIS: No, Your Honor.

THE COURT: Government?

MR. MARTIN: We haven't directly addressed the government's motion in limine to limit the impeachment of Mr. Thomas once he does take the stand. I think given the Court's ruling, we can see how it plays out during the course of the hearing.

THE COURT: I think we will see how it plays out during the course of the hearing after you turn over the information.

All right. Thank you. The hearing is set for May ...

MR. DENSEMO: May 23rd, Your Honor.

THE COURT: Thank you. May 23rd.

I think we gave -- let me just look at the time we gave because I want to make sure it's going to be sufficient.

MR. WATERSTREET: Your Honor, I have a 10 o'clock in the morning starting on the 23rd and you also set aside the 24th, if we need additional time.

Of course, I'm getting old and my memory's going.

THE COURT: No. You're right. I know it was the 23rd and we did. We have given it the whole day, 10:00 to 5:00.

MR. WATERSTREET: Okay.

THE COURT: And the 24th we have given it the morning up until two o'clock.

All right. We'll see you then. Thank you.

MR. WATERSTREET: Thank you.

THE CLERK OF THE COURT: All rise.

This Court is adjourned.

(At 4:15 p.m., matter concluded.)

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C E R T I F I C A T E

I, Darlene K. May, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. I further certify that the transcript fees and format comply with those prescribed by the Court and the Judicial Conference of the United States.

May 4, 2018
Date

/s/ Darlene K. May
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